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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO MEDINA SANCHEZ,

Defendant and Appellant.

C042029

(Super. Ct. No.
SF082982A)

Defendant Alejandro Medina Sanchez was found guilty of driving under the influence of alcohol with injury and personally inflicting great bodily injury (Veh. Code, § 23153, subd. (a), Pen. Code, § 12022.7, subd. (a)),¹ driving with a blood-alcohol level of .08 percent with injury and personally inflicting great bodily injury (Veh. Code, § 23153, subd. (b), Pen. Code, § 12022.7, subd. (a)), and hit-and-run resulting in permanent injury. (Veh. Code, § 20001, subd. (b)(2).) Defendant admitted one prior prison term. (§ 667.5,

¹ Further undesignated section references are to the Penal Code.

subd. (b).) Defendant was sentenced to six years in prison, ordered to pay restitution to the victim, and assessed a \$10,000 restitution fine under section 1202.4, subdivision (b), and a suspended parole revocation restitution fine under section 1202.45.

On appeal, defendant contends: (1) there was insufficient evidence to support his convictions; (2) the trial court erred in permitting testimony from the investigating officer that he disbelieved defendant's account of the crime; (3) the prosecutor committed misconduct by inquiring about the nature of defendant's prior felony convictions and discussing them in argument; and (4) cumulative error mandates reversal. We find no prejudicial error and shall affirm.

FACTUAL BACKGROUND

Prosecution Case

On August 18, 2001, 70-year-old Miguel Valdez was driving his car down Center Street in Stockton when he was struck by a van driving the wrong way down the street.² Valdez saw someone get out of the driver's door of the van and come over to him. A man without a shirt spoke to him. Valdez asked the man what he was "up to" and used a bad word to him. The man walked over toward a store. Valdez told someone holding him not to let the man get away.

Trucker Victor Serratos saw the accident. Serratos saw a man wearing dirty pants and a cowboy hat walk away from the driver's side

² Before the jury trial, defendant underwent a court trial concerning his competency. (§§ 1367, 1368.) After reviewing the reports of two examiners and defendant's own testimony, the trial court found defendant competent.

of the van. A passenger wearing a baseball cap ran away after the collision. Serratos spoke with the driver, who was walking around and smelled of alcohol. Serratos identified a picture as that of the driver. Serratos told the driver not to leave.

When Stockton Police Officer William Long arrived at the scene and took a description of the driver from Serratos, he pursued the suspect in his patrol car. Serratos went in his own car. Long detained defendant several blocks away because he matched Serratos's description of a Hispanic male about 60, wearing dirty pants with no shirt. Defendant was walking and seemed intoxicated. Although defendant denied being in a collision, he admitted he owned the van and was carrying a manila envelope with the pink slip and DMV papers. Serratos came to the scene and identified defendant, already in the patrol car, as the driver of the van. However, Serratos testified the driver of the van was not in court and he did not recognize defendant.

Defendant failed four field sobriety tests at the police station. Breath tests of his blood-alcohol content were .13 and .14. Defendant told Officer Long someone named "Jaime" had pulled a knife on him and forced him into his van.

Victim Valdez was taken to the hospital where he spent several months in intensive care. He was in a coma for three months, and endured three surgeries.

Defense Case

Officer Long testified that Serratos told him it was the passenger who was wearing a white shirt and white cowboy hat.

Officer Long acknowledged he had not written down defendant's claim he had been kidnapped by a man named Jaime.

Defendant testified he had been at a barbecue for homeless people in the park. He was drinking a little beer. He saw his van moving. When he jumped into his van, Jaime Vera was driving. Defendant was thrown into the windshield during the accident. Defendant blacked out. When he awoke, Jaime was gone. Defendant left through the open driver's door.

Defendant was injured and saw Valdez. When he approached the injured Valdez, Valdez told him he would kill him. Defendant fled with his van's paperwork. When detained, defendant gave Officer Long the full name of "Jaime Veras" and directed him where he might find Jaime.³

DISCUSSION

I

Defendant contends there was insufficient evidence to support his convictions, claiming that Officer Long's "self-serving" testimony comprised the "only evidence" defendant committed these offenses. Defendant specifically asserts his convictions rest on Officer Long's report that Serratos identified defendant as the driver of the van, although Serratos failed to identify defendant in court. We disagree with defendant's characterization of the evidence.

³ Or "Vera."

To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. "'To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 316-320 [61 L.Ed.2d 560, 571-574].) But the relevant question on appeal is not whether we are convinced beyond a reasonable doubt, but whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]"' (*People v. Marshall* (1997) 15 Cal.4th 1, 34, italics in original.)

Although Serratos did not actually see the driver exit the vehicle, he saw the driver inside the car and saw the driver come over to Valdez. Serratos spoke with that man from one foot away. Both Serratos and Long agreed Serratos positively identified the driver at the scene. Serratos identified a photograph, presumably of defendant, as that of the driver, even though he did not recognize defendant in court some months later. Regardless of any conflict in the description that the driver had a cowboy hat, a baseball hat, or no hat, Serratos spoke to the driver and identified defendant as that man shortly thereafter. There was no inference that Serratos had identified any other person as the driver, and no evidence he did not

make an identification of defendant as the driver. Defendant's argument that he was not the driver but the passenger was rejected by the jury.

Defendant's claim that the physical evidence "refuted" Long's testimony is similarly unavailing. Defendant's injuries were not inconsistent with being the driver of his own van engaged in an accident. Defendant's admitted intoxication is consistent with Serratos's encounter with a man smelling of alcohol. Defendant possessed the pink slip and related DMV papers for the van. We do not find Long's testimony "per se incredible." All determination of the credibility of the witnesses is for the jury. We decline defendant's invitation to substitute our judgment for that of the jury.

II

Defendant challenges the admission of Officer Long's testimony explaining why he did not investigate defendant's claim he had been kidnapped by "Jaime" at knifepoint, arguing it should have been excluded as irrelevant and more prejudicial than probative under Evidence Code section 352. Although defendant admits trial counsel failed to object to the testimony under section 352, he contends defendant's other objections adequately apprised the trial court of the issue. We conclude that, even if error, admission of the testimony was not prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836.

Background

Under direct examination by the prosecutor, Officer Long acknowledged defendant told him he had not been driving the van; that someone named Jaime had pulled a knife on him and was driving.

On cross-examination, Officer Long stated defendant was unable to give him Jaime's last name or where he lived. Defense counsel then asked Long a number of questions about the lack of police efforts to find or locate Jaime, when both Serratos and defendant told Long there were two people associated with the van.

On redirect examination, the prosecutor asked Long why he made no efforts to located Jaime.

"[Defense Counsel]: This is going to call for speculation. We know he didn't make any efforts. That is the salient part of that. I don't want him to speculate why he didn't.

"THE COURT: I will overrule the objection.

"[Officer Long]: Quite frankly, I didn't want to waste my time. I didn't find [defendant] very credible or believable.

"[Defense counsel]: You Honor, I will object to this, it is actually inappropriate.

"THE COURT: It is explaining his actions. You make the call on the credibility of witnesses. I will allow it for the limited purpose of why this person didn't seek out Jaime. We will let you go ahead.

"[Officer Long]: What I was thinking what I believed, I didn't find [defendant's] statement that he had been basically kidnapped at knifepoint by a person that he knew by first name very credible. Some indications of why I didn't do this: I am thinking in my own

mind, what would happen from a reasonable, prudent person in the same or similar circumstances. I am thinking --

"[Defense Counsel]: We are getting involved in too much speculation at this point. I will continue to object.

"THE COURT: I will note the objection. You opened the door.

"[Defense Counsel]: I opened the door to relevant and appropriate evidence and not speculation.

"THE COURT: This is the DA's response. He is asking why he didn't do it. You didn't think it significant to pursue evidence from the suspect.

"[Officer Long]: Not only the evidence but from all of my experience then as a police officer, people, victims of crimes don't run away from an accident scene. People, victims of crimes don't avoid the police when they see them. They contact the police. They want to report it. He didn't do that with me. I just think a person, if you know a person by name, I highly doubt this person is going to force you by knifepoint into your car

"[Defense counsel]: I will object to the narrative portion.

"THE COURT: I will let him finish. Why don't we finish up at this point.

"[Officer Long]: I just didn't find him credible that this was happening. I didn't believe him. I wasn't going to waste my time in looking for the person who I believed didn't exist.

"THE COURT: *This is for the limited purposes [sic], folks, of explaining why this officer didn't seek out that particular individual and make additional investigations. Not for the truth but*

to explain this officer's conduct or lack of conduct in seeking out this person." (Italics added.)

After a recess, defense counsel moved for a mistrial because the court permitted:

". . . not only a witness, but a representative of the state, a law enforcement officer, to get up there and speculate about my client's conduct. You have allowed him to directly comment on my client's credibility.

"THE COURT: Do you think you opened the door [defense counsel]?

"[Defense counsel]: I opened the door for his conduct. The fact is he was done. He was done with the investigation.

"THE COURT: In your opinion, he was done. In his own opinion, he was done, but for different reasons he will be arguing. I gave a limited [sic] instruction. I deny the motion. To not let the People ask why didn't you do anything else doesn't let them present their picture."

Officer Long was recalled as a defense witness. Once again, defense counsel began to question him about his conclusion "it wasn't worth your time to investigate further?" Defense counsel asked even more questions about the officer's personal and professional experience.

Analysis

Admission of evidence or exclusion of evidence under Evidence Code section 352 will not be disturbed on appeal absent a showing the trial court abused its discretion in an arbitrary, capricious, or patently absurd manner, leading to a manifest miscarriage of justice. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125.) "Evidence

Code section 353, subdivision (a), provides that a judgment shall not be reversed because of the erroneous admission of evidence unless there was a timely objection 'so stated as to make clear the specific ground of the objection' (*People v. Zapien* (1993) 4 Cal.4th 929, 979.) "[T]he rule that a challenge to the admission of evidence is not preserved for appeal unless a specific and timely objection was made below stems from long-standing statutory and common law principles." (*People v. Anderson* (2001) 25 Cal.4th 543, 586.)

Defendant initially objected on the grounds of speculation, "inappropriate," and later, after more questioning by the prosecutor, mentioned relevancy, and narrative problems. Defendant did not object under Evidence Code section 352. Therefore, the issue is waived.

However, assuming the issue was not waived because defendant moved for a mistrial, and because defendant did object, we still find no error. Defendant did, in fact, "open the door," by straightforwardly challenging Officer Long's unexplained failure to investigate defendant's explanation of the accident or to look for Jaime. And, defense counsel argued the jury speculated that Long was either or both negligent and indifferent. Therefore, on redirect examination, Long's explanation for why he did not do so was relevant and neither speculative nor inappropriate. Again, even assuming that Long's lengthy testimony about his own state of mind and analytical processes was of marginal relevance, we find no miscarriage of justice in its admission.

This is so for several reasons. First, the trial court expressly and immediately limited the testimony by admonishing the

jury they could not use Long's testimony for the truth of the matters or to evaluate defendant's credibility.

Second, the defense called Officer Long as its own witness during the defense case and again sought his testimony about why he failed to investigate further. This emphasis upon the officer's decision was solely due to defense strategy. Defense counsel, as would be expected, argued at some length about Officer Long's purported dereliction of duty.

Third, the jury was instructed again about the limited purpose of this evidence:

"Now, we had a bit of this particularly with Officer Long. His personal opinion about the defendant's credibility is not why that evidence was admitted. It was admitted for the limited purpose, to stress this again, of explaining why he didn't investigate the matter further. At this point you heard the lawyers argue that issue, only for that limited purpose only."⁴

Fourth, the jury had the opportunity to hear defendant, and was instructed it was the sole judge of credibility. (CALJIC No. 2.20.) In light of the cautionary instructions and defense counsel's own persistent strategy, the admission of this evidence was neither error nor prejudicial.

⁴ CALJIC No. 2.09, also given, provides: "Certain evidence was admitted for a limited purpose.

"At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

"Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

III

Defendant argues the prosecutor improperly impeached him with the nature of his prior felony convictions for spousal and elder abuse, and then compounded the error by using the felonies as improper character evidence in final argument, in violation of the trial court's order, violating defendant's due process rights. We disagree.

Background

Before trial, defense counsel asked that the convictions be "sanitized," so that the prosecutor would be permitted only to ask defendant about the fact he suffered two felony convictions.

The trial court first ruled on the admissibility of the conviction for section 273.5, spousal abuse:

"And I don't believe it is the type of prior conviction that is going to inflame everybody or dissuade [defendant] from testifying here. [¶] So balancing the probative versus the prejudicial value I will let the People impeach him with the fact of the felony conviction but not the underlying issues or facts that may have been involved in that." The trial court deferred its ruling on the admissibility of the elder abuse conviction. (§ 368.)

Nevertheless, on direct examination, defense counsel asked defendant if he had two felony convictions. Defendant stated he had been convicted of two separate crimes, about "four to five years ago."

On cross-examination, the prosecutor asked defendant the nature of the felony convictions. Defendant replied:

"The first one is for domestic violence. The second one is leaving an elderly person, leaving them so she could get injured.

"[The Prosecutor:] So your two convictions are felony domestic violence and felony inflicting injury upon an elderly person?

"[Defendant:] Yes. Well, I don't know what you mean inflicting injury, but it is just a person that I was taking care of and I let her get injured."

Defense counsel did not object to these questions.

During closing argument, the prosecutor referred to defendant's convictions:

"We know that [defendant] was convicted of two felonies, felony spousal and felony elder abuse. [¶] One of the things you look to the *gist of the felony conviction goes something like this: If you're going to commit a certain act which is so beyond the norm, lying on the stand is not going to be difficult for you. So if you're going to commit a felony that involves spousal abuse, violating that relationship, or elder abuse, a special victim, why are you testifying under oath, lying wouldn't be a problem, it wouldn't be --*

"[DEFENSE COUNSEL]: I'm sorry. He's misstating the law. He's asking that they view the specific conduct, the specific felony as character rather than limiting it as he should.

"THE COURT: The law allows you to consider a felony conviction for credibility only, not for character, just be guided by that principle. It's set forth in the instruction."

In his closing argument, defense counsel directly referred to the prosecution's comments, explaining the "significance of the

felony is a fact you consider, not a determinate fact, but a fact you can consider when weighing the credibility of that witness. It is just a factor. When the judge reads the instructions, he's going to say 'a felony conviction,' not for burglary, robbery, a 'felony conviction.'"

During jury instructions, the trial court did instruct the jury in the words of CALJIC No. 2.23, limiting the use of a felony conviction to credibility:

"The fact that a witness has been convicted of a felony, if this is a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness'[s] believability. It is one of the circumstances that you may take into consideration in weighing the testimony of that witness."

Analysis

A.

There was no misconduct committed by the prosecutor in questioning defendant about the nature of his prior felony convictions. When impeaching a witness with a prior felony conviction, counsel may ask a witness the nature of the prior convictions. (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) Contrary to the assumption of defendant's argument, the trial court did not preclude the prosecutor from asking defendant about the nature of his felony convictions. The court simply ordered the prosecutor not to go into the "underlying issues or facts" of the prior convictions.

Moreover, even if trial counsel misunderstood the nature of the trial court's pretrial order, he failed to object to the questions. In fact, the pretrial order had deferred ruling on the admissibility of the elder abuse conviction, and counsel not only asked his client if he had two prior felony convictions, he also failed to object when the prosecutor asked for what category of offense each was acquired. Hence, any error was waived.

B.

Defendant argues the prosecutor's mention of the nature of the prior convictions suggested defendant had a "propensity" for violent conduct. We disagree.

Prosecutorial misconduct in closing argument is evaluated under two standards. If a prosecutor's argument infects the trial rendering it fundamentally unfair, it may constitute constitutional error under federal law. If the prosecutor uses "deceptive or reprehensible" methods to persuade the jury, there is prejudicial error under state law if a miscarriage of justice has occurred. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

In this case, the prosecutor linked the nature of the prior convictions to lying, logically implying that someone who would violate the special relationships included in spousal or elder abuse was likely to lie. While the prosecutor obviously intended to tell the jury defendant was particularly likely to lie because of the nature of his prior convictions, he did not explicitly state he was more likely to drive under the influence or leave the scene of an accident. These were completely dissimilar charges. This was not an

invitation to use improper propensity evidence, or an intimation of bad or violent character.

In any event, there was no prejudice. First, trial counsel immediately objected. Second, the trial court immediately admonished the jury as to the proper use of felony convictions for credibility rather than character. Any possible harm was cured by the prompt and proper admonition.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

MORRISON, J.